

In his Application for Preliminary Hearing, the claimant alleges two dates of accident — March 1, 1993 and September 30, 1993. The respondent admits that the claimant suffered a compensable injury on March 1, 1993, but denies a compensable injury on September 30, 1993. The Administrative Law Judge, however, granted the claimant's request for benefits for the September 30, 1993 accident. From that Preliminary Hearing Order, the respondent appeals raising the following the issues:

- (1) Whether the claimant's alleged personal injury by accident on September 30, 1993, arose out of and in the course of his employment;
- (2) Whether timely notice was given; and,
- (3) Whether, if the claimant's claim is compensable, the Administrative Law Judge erred in ordering payment of temporary total disability compensation.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

This Preliminary Hearing Order is subject to review by the Appeals Board as the first two issues raised by the respondent are issues specifically enumerated in K.S.A. 44-534a(a)(2) as jurisdictional and subject to review.

(1) The claimant made claim for temporary total disability and medical benefits, alleging he suffered a work-related accidental injury on September 30, 1993. The respondent argues that due to numerous inconsistencies in the claimant's testimony which raise questions as to his credibility, the claimant did not sustain his burden of proof that he suffered a work-related accidental injury. The respondent goes on to further contend that a question was raised as to whether claimant's alleged injury occurred at work because he was involved in two fights not work related in July 1993 and October 1993.

The Appeals Board, after a review of the whole record, disagrees with the respondent's arguments and finds, for reasons set forth below, that the claimant has established that he suffered an accidental injury while employed by the respondent on September 30, 1993.

On March 1, 1993, the claimant suffered a severe injury to his left shoulder when a cabinet fell on him while working for the respondent. Arthroscopic surgery was performed on his left shoulder on April 22, 1993, by Milo G. Sloo, III, M.D., an orthopedic surgeon in Salina, Kansas. Claimant was off work from March 18, 1993 to May 24, 1993. Claimant testified he returned to his regular job as the head sander and performed these duties until he re-injured his left shoulder on September 30, 1993, while lifting a three to four hundred (300-400) pound Alco service cabinet. Claimant testifies that he was lifting the cabinet with respondent Leroy Timm, the owner of Timm Cabinet, when the injury occurred. Additionally, claimant reported the injury to Mr. Timm on October 5, 1993, and filled out a Report of Accident the same day, giving the report to Mr. Timm after he made a copy of the report for himself. Donna R. Potter, an employee of the respondent in October 1993, testified that sometime before October 10, 1993, she had observed the claimant filling out an accident report in the office of the respondent.

After this injury, the claimant first sought medical treatment from his family physician, D. C. Rorabaugh, M.D., on October 6, 1993, where he accurately described that he injured his left shoulder while lifting an Alco cabinet on September 30, 1993. Dr. Rorabaugh then referred claimant to Dr. Sloo for treatment on October 27, 1993, and again the claimant accurately gave a history that he had injured his shoulder while lifting a

cabinet at work. Dr. Sloo's impression was recurrent left shoulder injury. The last time the claimant saw Dr. Sloo was November 11, 1993, where he noted claimant was not improved and needed an arthrogram. Claimant has not received additional medical treatment because the respondent has refused to provide such treatment.

The claimant also testified that he was involved in altercations in July and October 1993 but he was not injured in any way during these altercations. The latter altercation actually occurred after he was terminated from his employment with respondent.

(2) In regard to timely notice, the respondent claims the claimant did not give the required notice of his accidental injury within ten (10) days as required by K.S.A. 44-520. However, the real dispute is whether such notice was given by the claimant on October 5, 1993 as alleged by the claimant, or October 7, 1993 as alleged by the respondent, Leroy Timm. Mr. Timm testified that he was first notified claimant had suffered a second accident on October 7, 1993. He further testified that claimant said his injury was work related at that time.

The evidentiary record in this matter, through the claimant's testimony, respondent's testimony and the testimony of Donna Potter, firmly establishes that the claimant verbally notified the respondent and subsequently filled out a written report of the accident which he gave to the respondent on either October 5 or October 7, 1993. Since the date of injury is September 30, 1993, both the dates of October 5 or October 7, 1993, are within ten (10) days and meet the statutory requirement for timely notice.

(3) The Appeals Board, having found this claim compensable, is requested by the respondent to review the Order of the Administrative Law Judge awarding temporary total disability benefits to the claimant. Respondent contends the evidence does not support a finding that claimant is temporarily and totally disabled. The Administrative Law Judge is authorized to make a preliminary award of temporary total disability compensation upon finding that the claimant's alleged injury is compensable. See K.S.A. 44-534a(a)(2). Accordingly, there is no issue pertaining to whether the Administrative Law Judge exceeded his jurisdiction in ordering temporary total disability. The issue as to whether or not the Administrative Law Judge erred in ordering temporary total disability compensation is not reviewable by the Appeals Board.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order entered by Administrative Law Judge James R. Ward, dated November 4, 1994, is affirmed and remains in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 1995.

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BOARD MEMBER

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**BOARD MEMBER**

- c: Gregory J. McDonald, Abilene, KS  
Jeffrey E. King, Salina, KS  
Norman R. Kelly, Salina, KS  
James R. Ward, Administrative Law Judge  
George Gomez, Director